GAN HEAH SIEW v. TRIUMPHAL ENTERPRISES SDN. BHD.

[O.C.J. (Abdul Razak J.) February 5, 1979]
[Kuantan — Civil Suit No. 119 of 1977]

Practice and Procedure — Application for summary judgment — Failure to carry out terms of agreement — R.S.C., 1957, O. 14.

In this case an agreement had been entered into between the deceased and the respondent company whereby the deceased agreed to transfer a piece of land to the respondents for development purposes in accordance with a layout plan. The respondents were within one month to submit a layout plan to the State Planning or other authority and thereafter to apply for conversion and sub-division of the land. As the respondents had not taken any steps to submit the layout plan for approval or to apply for conversion and sub-division, the executor filed a writ for the land to be re-transferred to him, as the executor of the estate of the deceased. He applied for final judgment under Order 14, rule 1.

Held: in the circumstances the applicant was entitled to final judgment as prayed.

CIVIL SUIT.

O.C. Lim for the applicant.

A.K. Lee for the respondents.

Cur. Adv. Vult.

Abdul Razak J.: This is an application by the executor that final judgment be entered against the defendants under Order 14 rule 1. The applicant affirmed that an agreement was entered into between the deceased and the respondent company on July 22, 1973 whereby the deceased agreed to transfer a piece of land E.M.R. 341 Lot 755 Mukim of Mentakab to the respondents for development purposes in accordance with a layout plan. The deceased was to transfer the land to the respondents on the execution of the agreement. The respondents were within one month thereof to submit a layout plan to the State Planning or other authority. In the event of the planning approval being refused the respondents covenant to re-transfer the land to the deceased and the agreement shall then cease to have any effect. Upon the approval of the layout plan the respondents shall forthwith apply for conversion and sub-division of the land and shall apply for separate issue of document of title in respect of each individual lot. Thereafter immediately after the separate issue of document of title has been obtained respondents shall submit building plans to the local authority for approval. The work was to commence within three months of the building plan being approved. The agreement was binding on the personal representative of the deceased and successor in title of the assign of the respondents. Those are for present purposes the terms of the agreement.

The applicant said the land was duly transferred to the respondents but no layout plan had been submitted for approval or if submitted had been approved nor have the respondents applied for conversion and sub-division of the land and obtained separate title and consequently submitted building plans to the local authority for approval; nor has work commenced within three months of the approval of the building plan as stipulated in the agreement. Letters were sent by applicant's counsel Mah-Kok & Din as early as December 31, 1974 to 1975 to the respondents requesting information regarding the progress of the proposed development. The letters were exhibited in the affidavit. There was no reply to the said letters. This was followed by further letters from the firm of Au Ah Wah in 1975 to 1976 as exhibited in the same affidavit requesting for the said information but again there was no response from the respondents to the said letters. The present solicitors Chung & Huang then wrote to the respondents on January 25, 1977 invoking Clause 6(a) of the agreement and asked that in the circumstances the land be re-transferred to the applicant. The respondents again did not reply to the letter nor intimate what was on foot. The applicant therefore filed the writ for a transfer of the land followed by the present action for summary judgment.

The respondents in their affidavit in reply said merely that they had submitted layout plans to the local authority through the deceased even before the execution of the agreement and the letter to that effect was exhibited in their affidavit. They said the letter was sent by the deceased as he was then the registered proprietor of the land and no power of attorney was given to the respondents to apply for approval on their behalf. They said that they had obtained the planning permission from the said local authority as exhibited by them. The affidavit also states that the summons was irregular since it had not set out the full minutes of the judgment sought by the plaintiff as required under Order 14A.

The application initially came before the Senior Assistant Registrar who since he had no jurisdiction in the matter adjourned it to be put before the Judge in Chambers. On the day of the application before me the applicant sought to amend the statement of claim embodying the matters already set out and also the minutes of the judgment sought for. These amendments were served on the respondents earlier. No objection was made by counsel at the day of hearing on the amendments sought or application made to amend the respondents' defence. That there was no amendment to be made to the defence could be gathered from the line of counsel's own argument. He did no more than repeat what essentially respondents had said in their affidavit and statement of defence. But clearly looking at the arguments and facts adduced there had been no compliance by the respondents of the contract in essential matters. Firstly, and the most essential and glaring one, is that the respondents had failed to submit the layout plan to the planning authority for approval within one month of the execution of the agreement. They however said they had done so through the deceased. Indeed such application was made by the deceased himself in his letter (Exhibit WHW1 in the affidavit of the respondents dated August 16, 1977). But first it had to be established that the layout plan submitted by the deceased was in accordance with the layout plan stated in Clause 2 of which fact the respondents' affidavit did not say so. But it was vital that the deceased knew this because if the number of houses in the plan as approved by the planning authority was less than what the parties had agreed to in Clause 2, then under Clause 6(b) the contract was frustrated and the parties were entitled to enter into a fresh agreement. I think on this basis alone the contract was at an end and the parties were back to square one. All we know was

that the deceased applied for and submitted five copies of the proposed sub-divisional plan. However neither this plan as submitted nor the one said to have been approved by the local authority had been made available to this court as to show that they referred to the one and same plan indicated by Clause 2. One cannot entirely rule out the possibility that the deceased might have changed his mind regarding his first layout plan since he last sent his application for its approval three months earlier and therefore had intended that the layout plan in the agreement shall be the final one and should prevail instead. This should be the necessary construction if the sending of one plan to the authorities before the agreement is to be reconciled with the sending of the purportedly same plan after the agreement.

But be as it may, clearly under Clause 5 the agreement requires that the application must be made by the respondents themselves as distinguished from the deceased. The fact that the agreement was made three months after the said letter (Exhibit WHW1) must give rise inevitably to the assumption that at the time when the agreement was made the parties were aware of the existence of the said letter. If they had provided nevertheless therefore that the respondents were to make the application to submit the layout plan it must have meant precisely what it said. Clearly the deceased had done so in order that the respondents rather than him bear the expenses and fees connected with the development of the land, as made clear in Clause 13. The purport of Clause 5 can be gathered also from Clause 12 of the agreement where he was stated to receive only the profit of the development without any liabilities. It was clear thus looking at Clauses 12 and 13 that once the application was made in the deceased's name to the appropriate authorities then all other applications which follow — conversion, architect and lawyer's fees as provided in Clause 13 would and could also be, if the respondents wish, (if not for Clause 5) be also in the deceased's name and he would legally and naturally be liable to pay for them and for the fees arising, if any, which was clearly as seen by Clause 13 not what the deceased wanted it to be. Therefore the requirement that the application for the layout plan be made by the respondents in their name was thus only to be conceived and the transfer of the land to the respondents under Clause 4 was only to make that application possible.

That notwithstanding, other provisions of the agreement have also clearly not been complied with which calls for a recission. There is no evidence to show that the application has been made for conversion, and separate titles obtained for the land as required under Clause 7 or for approval of the building plan as required under Clause 8 or that work had commenced under Clause 9. The supposed layout plan was purportedly approved by the authorities in October 1976. Nevertheless even up to November 29, 1978 which was the date of the present application, a period of two years, there was still no sign that they had made such application because no such application was ever produced. We would be surprised if indeed they had, otherwise we are at a loss to know why in spite of the several letters by the applicant's several counsel inquiring about the state of affairs between them, the respondents had maintained absolute silence.

I cannot but conclude that in the circumstances the applicant is entitled to the order prayed for as in the draft judgment. I would also order that the respondents pay the cost of the application.

Order accordingly.

Solicitors: *Chung & Huang; A.K. Lee & Co.*

SUBRAMANIAM v. TAN LEE LENG & ORS.

[O.C.J. (Salleh Abas F.J.) February 19, 1979]
[Kuala Lumpur — Civil Suit No. 40 of 1979]

Administrative Law — Co-operative Society — Declaration that election to Management Committee null and void — Whether statutory remedies exhausted — Co-operative Societies Ordinance, 1948, s. 49(2)(c).

Co-operative Society — Application for declaration that election to management committee null and void — Co-operative Societies Ordinance, 1948, s. 49(2)(c).

The plaintiff applied for a declaration that the election of the defendants to the Management Committee of a Co-operative Society was null and void because of forged proxy notes. The matter had been referred to the Registrar-General of Co-operatives and he had stated that the dispute should be settled by the court in accordance with section 49(2)(c) of the Co-operative Societies Ordinance. The defendants applied to have the writ of summons set aside.

Held: there had been sufficient compliance with section 49 and in particular with section 49(2)(c) of the Co-operative Societies Ordinance and therefore the application to set aside the writ of summons must be dismissed.

CIVIL SUIT.

Gopal Sri Ram (*C. Vijaya Kumar* with him) for the plaintiff.

F.H. D'Cruz for the defendants.

Salleh Abas F.J.: The plaintiff and the five defendants in this case are members of a cooperative society known as the N.U.T. Multipurpose Cooperative Society Limited registered under the Cooperative Societies Ordinance, 1948. On November 18, 1978, the 5 defendants were elected to the Management Committee of the Society which, according to the Byelaws of the Society, is the executive authority of the Society. The plaintiff alleged that the election of the defendants to the Management Committee was secured by forged proxy votes which were counted and acted upon and the first defendant was so informed of this fact on December 16, 1978, by one S. Tharmaratnam, the past Chairman of the Management Committee of the Society.

On January 9, 1979, the plaintiff commenced civil suit against the defendants asking for a declaration that the election of the defendants to the Management Committee was null and void because of the forged proxy votes, and that they are not entitled to act as Management Committee. The plaintiff was also asking for an injunction to restrain the defendants from acting as members of the Management Committee. On the same date (January 9, 1979) in an *ex parte* summons-in-chambers, plaintiff obtained an interim injunction to restrain the defendants from carrying out